Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

LANDMARK CAPITAL II, LLC
and ROBERTA K. LOWERY,

Petitioners,

v.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III; CAL-AMERICAN PROPERTY FUND VI; CAL-AMERICAN PROPERTY VII; and CAL-AMERICAN PROPERTY FUND IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

TERENCE C. GILL
Counsel of Record
ELOISE HENDERSON BOUZARI
SHERMAN & HOWARD L.L.C.
Attorneys for Petitioners
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900

167481

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Was the Ninth Circuit correct when it concluded as a matter of law that a single buyer of securities could never monopolize the market for a company's securities by willfully excluding all other buyers?

2. The Ninth Circuit ruled, in accord with the Third Circuit in *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 769 F.2d 152 (3d Cir. 1985), that a market consisting of a single company's securities could not under any circumstances constitute a relevant market for federal antitrust law purposes. The Second Circuit in *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990) reached the contrary conclusion, creating a split of authority between three circuits. Which circuit is correct?

3. Is the Ninth Circuit correct in concluding that thousands of investors holding securities in thinly traded limited partnerships have no recourse under the federal antitrust laws when a single buyer willfully excludes all other buyers, leaving that market to itself?

PARTIES TO THE PROCEEDING

The Parties before this Court appear in the caption of the case on the cover page.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Landmark Capital II, LLC has no parent company and no publicly held company owns 10% or more of its stock. Petitioner Roberta K. Lowery is an individual.

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Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, and is printed in the appendix hereto ("App.") at 1a. The trial court granted the Defendants' motion to dismiss in an unpublished order printed in the appendix at 3a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 13, 2001. No petition for rehearing was filed. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15(a):

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

This case stems from the efforts of Petitioner Landmark Capital II, LLC ("Landmark") to enter the market for the purchase of limited partnership interests in a series of California-based limited partnerships with an aggregate equity value of approximately $65 million. Each of these partnerships consists of hundreds or thousands of security holders who purchased these securities decades ago, many of whom now seek to sell their securities. Although Landmark attempted to enter the market for these securities, Respondent Fred Hameetman ("Hameetman"), the general partner of the partnerships, consistently and arbitrarily thwarted Landmark's and others' efforts to become a substitute limited partner and to make bids for additional securities. Instead, as discussed below, Hameetman, by excluding Landmark and others from the limited partnerships and thus from offering to purchase additional partnership interests, has exerted complete monopolistic control over the relevant market.

Petitioner Roberta K. Lowery ("Lowery") purchased limited partnership interests ("Units") in the four Defendant Funds (the "Funds") in the years 1975 and 1978 for retirement purposes. Petitioners contend that the relevant market for their antitrust claims is the sale and purchase of these Units; by definition the sellers of these Units are limited to current owners such as Lowery, and buyers and potential buyers, while potentially unlimited, have been limited to a single buyer: Hameetman. Hameetman's status as the only buyer does not arise from any contractual provision requiring the Unit holders to sell only to him. The limited partnership agreements permit the Unit holders to sell to anyone, subject only to complying with any applicable securities and tax provisions.

The Funds are widely held by hundreds or perhaps thousands of investors who purchased the Units in offerings during the 1970s. After holding the Units for 20 years, retiring and becoming a widow, Lowery decided to sell her Units. At this point, Lowery's Units, as with all the partnership Units, were now freely transferable under applicable state and federal securities laws. Landmark, an entity in the business of purchasing limited partnership interests for investment purposes and desiring to enter the market for the purchase of these Units, agreed to buy Lowery's Units. Landmark intended to become a substitute limited partner in the Funds, learn the identity of the other Unit holders and make bids for these Units at prices far in excess of those offered by the general partner, which, as stated, typically was the only buyer available.

However, in order for Landmark to become a substitute limited partner, the general partner needed to undertake certain ministerial actions, including causing the sale to

be reflected on the Funds' books and records, directing the Funds' transfer agent to process the sale transaction and consenting to Landmark becoming a substitute limited partner. The partnership agreements specifically provided that this consent could not be unreasonably withheld. Hameetman refused to consent to Lowery's transfer to Landmark, or to perform any of the ministerial acts required of him. Indeed, Hameetman would not even permit Landmark to become an assignee of these Units.

Hameetman's conduct is designed to exclude investors such as Landmark from participating in the market for these Units. By excluding sophisticated investors from the market such as Landmark, Hameetman has been able to keep the market for these Units to himself, allowing him to purchase Units in the Funds from Unit holders for a fraction of their true value. This has destroyed the value of these Units for Unit holders such as Lowery. By arbitrarily barring Landmark and others from becoming limited partners, Landmark is precluded from learning the identity of other Unit holders, making it impossible for Landmark to offer to purchase additional Units. This has left the market for these Units entirely to Hameetman, as has been the case for twenty years.

Through his conduct and behavior, Hameetman maintained a monopoly over the purchase and sale of partnership interests in the partnerships he controlled. Landmark paid Lowery 40% more for her partnership Units than Hameetman was willing to pay her and Hameetman was fully informed of the premium Landmark was offering. By preventing Landmark and others from becoming substitute limited partners, he is able to control both access to the relevant market and the price for sales in that market.

It is important to note that this factual scenario is not unique; hundreds if not thousands of real estate limited partnerships were established in the 1970s and 1980s with general partners selling investment interests to the public through non-registered offerings. Typically, the presence of one or more independent investors such as Landmark has drastically increased the asking price for interests in these partnerships and has often resulted in bidding wars between the general partner and outside investors. Thus, the inability of investors such as Landmark and Lowery to assert antitrust claims against the general partner in these entities will ultimately result in a substantial harm to the investor community.

Landmark and Lowery filed their complaint against Hameetman and the other Defendants in April 1999, alleging breaches of the limited partnership agreement, various state law torts, and monopolization and attempted monopolization of the market for limited partnership interests in the defendant partnerships by Hameetman, a violation of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

The district court orally granted the Defendants' motion to dismiss at a hearing on July 19, 1999 and issued a written order on August 24, 1999. The trial court provided no written or oral findings of fact or conclusions of law indicating the basis for its ruling. On appeal, the Ninth Circuit affirmed. It issued a one-paragraph order, stating that Petitioners had failed to plead a "cognizable relevant market," relying on the Third Circuit decision, *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), and the United States District Court for the District of Delaware's decision in *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F. Supp. 922 (D. Del. 1983), *aff'd*, 769 F.2d 152 (3d Cir. 1985).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The ruling in this case has added to a glaring split of authority between the circuit courts as to whether the secondary market for the securities of a particular company can ever constitute a relevant market for purposes of section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. The Ninth Circuit below, in ruling that a secondary market in the securities of a particular company can never constitute a relevant market, cited *Kalmanovitz*, a 1983 Delaware federal district court case, which was subsequently affirmed by the Third Circuit on different reasoning. That decision was expressly disapproved by the Second Circuit five years later in *Finnegan v. Campeau Corp.*, 915 F.2d 824, 826-27 (2d Cir. 1990). Thus while the Ninth and Third Circuits have ruled that the Sherman Act categorically does not apply to securities cases, stripping securities holders from all protections of the federal antitrust laws, the Second Circuit, taking the more reasonable view, has held that the Sherman Act does apply to such situations *unless* it can be demonstrated that the antitrust laws are clearly revoked by the subsequent adoption of a specific federal securities law.[1] Here, unlike the situation in *Finnegan*, no federal securities law so pervades the circumstances of the case as to result in an implied revocation of the antitrust laws. Thus, this case presents the Court with a unique and important opportunity to resolve this conflict among the circuits and to make clear

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1. *See also* Phillip E. Areeda *et al.*, ANTITRUST LAW ¶ 954d n.20 (rev. vol. IV 1998) (concluding, in light of *Finnegan*, that collusive bidding for securities would "be a plain antitrust violation unless immunized by regulatory provisions").

that the federal antitrust laws may not be categorically ignored simply because the matter at issue is securities in a secondary market.

The Ninth Circuit below also incorrectly relied upon *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.2d 430 (3d Cir. 1997) to support its ruling.

DISCUSSION

A. The Ninth Circuit Wrongly Sided with the Third Circuit's Decision in *Kalmanovitz*; the Second Circuit's Decision in *Finnegan* Contains the Correct and Fairer Rule.

The Ninth Circuit affirmed the district court's order dismissing Landmark's and Lowery's complaint, relying on the Delaware district court's decision in *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F. Supp. 922 (D. Del. 1983), *aff'd*, 769 F.2d 152 (3d Cir. 1985). In *Kalmanovitz*, unlike the case at bar, the plaintiff was seeking to take over a publicly traded company through a public tender offer, a transaction expressly regulated by the Williams Act, section 14(d) of the Securities Exchange Act of 1934, as amended, 78n U.S.C. § 14(d). 576 F. Supp. at 924. In *Kalmanovitz*, the district court, while not specifically finding that the federal antitrust laws were preempted, concluded that the fact that the Williams Act applied indicated that battles for control of a single company could not be considered a relevant market for federal antitrust law purposes. *Id.* at 927-28.

Regardless of the strength of this reasoning, it is without dispute that the Units involved in this case are not subject to

the Williams Act, since the Funds were never registered under the Securities and Exchange Act. Moreover, unlike the situation in *Kalmanovitz*, neither Lowery nor Landmark are alleged to have made a tender offer for Units in the Funds, whether regulated by the Williams Act or not. Instead, Landmark sought to participate in the market for Units in the Funds by buying discrete Units, but has been excluded from the market altogether by Hameetman. Lowery seeks compensation for her inability to sell her Units at the competitive prices that would have resulted but for the general partner's exclusionary conduct.

The district court's decision in *Kalmanovitz* was affirmed by the Third Circuit on slightly different grounds. 769 F.2d 152, 156 (3d Cir. 1985). Rather than concluding that the federal securities laws somehow preempted the entire area of federal antitrust law, the Third Circuit ruled, narrowly, that the sale of stock of a single company does not constitute a "restraint upon commercial competition in the marketing of goods and services" since securities are neither goods nor services. *Id.* This ruling, however, is contrary to the rulings of both the Second Circuit and this Court.

In *Finnegan v. Campeau Corp.*, 915 F.2d 824, 826 (2d Cir. 1990), the Second Circuit was faced with the same situation presented to the Third Circuit in *Kalmanovitz*: a battle for corporate control in which two competing offerers conspired to eliminate one bid, lowering the price of the overall bids for the company's securities. The Second Circuit expressly disapproved of the Third Circuit's position that securities of a single company are not "goods or services" and therefore are not subject to the federal antitrust laws. *Finnegan*, 915 F.2d at 827-28. On the contrary, the Second Circuit, relying on decisions from this Court, concluded that

the federal antitrust laws' reference to goods and services includes sales of such intangibles as stock, commodities, and bank credit and services. *Id.* at 827-28 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963)). Instead, the Second Circuit concluded that securities holders not only have standing to sue under the federal antitrust laws, but that the federal antitrust laws do apply to sales of securities of a single issuer *unless* it can be demonstrated that those laws were impliedly revoked by the adoption of a specific federal securities law. *Id.* at 828.

In *Finnegan*, the court addressed the issue of whether the Williams Act impliedly revokes the Sherman Act. *Id.* In so doing, the court reminded us that repeal "by implication is not favored and not casually to be allowed. Only where there is a plain repugnancy between the antitrust and regulatory provisions will repeal be implied." 915 F.2d at 828 (quoting *Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975)). The Second Circuit determined that the Williams Act impliedly revoked the Sherman Act in the context of a takeover of a public company registered under the Securities Exchange Act of 1934. *Id.* at 828-32. However, the Williams Act does not apply to the facts alleged in this case, making the Second Circuit's initial ruling — that the federal antitrust laws do apply — applicable here. *Id.* at 828 (stating that the Williams Act "does not foreclose all antitrust claims arising in the context of market manipulation").

The opportunity for this Court to reject the Third and Ninth Circuit and adopt the view of the Second Circuit has substantial implications for investors throughout the country. While there may be an argument that investors in publicly

registered companies traded over major stock exchanges are protected against the monopolistic control of a few buyers in the context of a federally regulated tender offer, this is definitely not the case in a myriad of other securities markets, including the privately issued securities at issue here, but also for commodities, municipal bonds, intrastate offerings and the many other intangible goods that through the lack of regulation and the intricacies of their transfer mechanisms make them ripe for manipulation and control by a single buyer.

This case gives the Court the opportunity to set an important example that the price for any goods or services cannot be controlled with impunity. It must be made clear that artificial barriers to new entrants into any market cannot be allowed. Such opportunity for entry and resulting competition is precisely the kind of right the antitrust laws were designed to protect.

B. The Ninth Circuit Misapplied the Third Circuit's *Queen City Pizza* Decision in This Case, Thus Depriving Thousands of Potential Antitrust Victims from the Protections of the Federal Antitrust Laws.

In relying on the Third Circuit's decision in *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.2d 430 (3d Cir. 1997), the Ninth Circuit misconstrued the facts of this case. But in doing so, it established a rule of law that would, if not corrected, prevent thousands of potential claimants from obtaining the relief afforded to them under the federal antitrust laws.

In *Queen City Pizza*, a series of Domino's pizza franchisees sued Domino's under section 2 of the Sherman

Act, arguing that Domino's monopolized the market for Domino's approved pizza ingredients. 124 F.3d at 433-35. Under the franchisee's agreements with Domino's, each franchisee was contractually required to purchase its ingredients from Domino's or a supplier authorized by Domino's. *Id.* at 433. The franchisees contended that Domino's took advantage of these franchise relationships by making itself effectively the exclusive provider of key ingredients and charging supercompetitive prices to the franchisees, thus creating a monopoly over those supplies. *Id.* at 434.

The Third Circuit affirmed the district court's dismissal of the franchisee's case, concluding that it was incorrect to limit the relevant market for pizza ingredients as those permitted to the franchisees under the franchise agreements. *Id.* at 437-38. While the Third Circuit failed to articulate a reason for this conclusion, the district court, whose ruling was affirmed, did:

> Plaintiffs do not and cannot purchase ingredients and supplies from alternative suppliers not because Domino's dominates the ingredient and supply market or because Defendant is the market's only supplier, but because the franchisee-plaintiffs are contractually bound to purchase only from suppliers approved by the Defendant. It is economic power resulting from the franchise agreement, therefore, and not market power, that defines the "relevant market" Plaintiffs allege in support of their antitrust claims.

Id. at 435 (quoting trial court's order). The Third Circuit thus concluded that the franchisee's predicament resulted

not from Domino's willful acquisition of monopoly power over an otherwise competitive market, but through Domino's proper exercise of its rights under the terms of the franchise agreements which the franchisees willingly signed. *Id.*

While this conclusion may have had merit under the facts before the Third Circuit, it has no applicability here, where there is no contractual provision that holders of Units can sell those Units only to the general partner. Rather, the facts demonstrate that the general partner has manipulated the Unit transfer mechanisms in a way that prevents all transactions in the Units except for those in which it is the purchaser.

Moreover, even if a contractual relationship existed that under certain circumstances would permit the general partner to legitimately prohibit all sales of a limited partnership's shares except to itself (a provision that is absent here), the antitrust inquiry does not simply end there. This Court has made clear that under such circumstances the complaining party may demonstrate that the defendant's purported reliance on a contract or statutory authority (*e.g.*, a patent) is a mere pretext for the transgressor's monopolistic behavior. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 484 (1992). Here, as in *Kodak*, Landmark has alleged and can demonstrate that the general partner vastly exceeded his authority under the partnership agreements when he refused to make Landmark and others substitute limited partners, thus demonstrating that the general partner's reliance on the partnership agreements is a mere pretext. The best evidence of this pretext is the fact that virtually all transfers of Units in the four partnerships over the past ten years have been to Hameetman, and every effort to acquire Units by sophisticated investors such as Landmark has been arbitrarily refused.

Finally, by denying Landmark and Lowery's right to proceed with this case, the Ninth Circuit has violated the principle of this Court's decision in *Kodak* that antitrust cases are subject to the same factual standards as any other case and may not be disposed of through the adoption of categorical rules obviating the need for factual inquiry. *Id.* at 466-67 ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' ") (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925)).

CONCLUSION

In adopting the Third Circuit's *Kalmanovitz* and *Queen City Pizza* decisions, the Ninth Circuit below has attempted to avoid the task of careful factual inquiry by adopting categorical rules prohibiting federal antitrust claims in a factual context into which that court apparently concluded that the antitrust laws should not venture. In doing so, the Ninth Circuit has perpetuated a split of authority with the Second Circuit regarding the application of the antitrust laws to the securities markets. More importantly, the Ninth Circuit has ignored this Court's admonition in *Kodak* that antitrust cases do not have any special status that permits courts to avoid factual inquiry by crafting *a priori* rules. Without this Court's intervention, the important policies underlying the antitrust laws will be applied unevenly among the circuits. Therefore, Petitioners respectfully ask the Court to grant their petition for certiorari.

Respectfully submitted,

TERENCE C. GILL
Counsel of Record
ELOISE HENDERSON BOUZARI
SHERMAN & HOWARD L.L.C.
Attorneys for Petitioners
633 Seventeenth Street, Suite 3000
Denver, Colorado 80202
(303) 297-2900

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 13, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-56701
D.C. No. CV-99-03851-RSWL

LANDMARK CAPITAL II, LLC, a California [sic] limited liability company; ROBERTA K. LOWERY,

Plaintiffs-Appellants,

v.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III, a California limited partnership; CAL-AMERICAN PROPERTY FUND VI, a California limited partnership; CAL-AMERICAN PROPERTY VII, a California limited partnership; CAL-AMERICAN PROPERTY FUND IV, a California limited partnership,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Argued and Submitted March 6, 2001
Pasadena, California

Before: ALARCÓN, BRUNETTI, and HAWKINS, Circuit Judges.

Limited partnership interests in the partnerships of Cal-American Income Property Funds III, IV, VI and VII do not constitute a cognizable relevant market under 15 U.S.C. § 2 of the Sherman Antitrust Act. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *Kalmanovitz v. Heileman Brewing Co., Inc.*, 576 F.Supp. 922, 927 (D.Del. 1983). Therefore, Landmark II has failed to state a claim upon which relief can be granted.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA RE DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP RULE 12(b)(1) AND (6) DATED AUGUST 24, 1999 AND ENTERED AUGUST 25, 1999

MUSICK, PEELER & GARRETT LLP
ATTORNEYS AT LAW
ONE WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90017-3383
TELEPHONE (213) 629-7600
FACSIMILE (213) 624-1376

Willie R. Barnes (State Bar #030028)
Eric L. Troff (State Bar #110031)

Attorneys for Defendants
FRED HAMEETMAN, CAL-AMERICAN INCOME PROPERTY FUNDS III, IV, VI and VII, California limited partnerships

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 99-03851 DT (RZx)

Appendix B

LANDMARK CAPITAL, II, LLC, a Colorado limited liability company, and ROBERTA K. LOWERY,

Plaintiffs,

vs.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III, a California limited partnership; CAL-AMERICAN PROPERTY FUND IV, a California limited partnership; CAL-AMERICAN PROPERTY FUND VI, a California limited partnership; CAL-AMERICAN PROPERTY FUND VII, a California limited partnership; and DOES 1 through 10, Inclusive,

Defendants.

ORDER RE DEFENDANTS' MOTION TO DISMISS PURSUANT TO FRCP RULE 12(b)(1) and (6)

DATE: AUGUST 16, 1999
TIME: 9:00 A.M.
PLACE: COURTROOM 21

The Motion of Defendants Fred Hameetman and Cal-American Income Property Funds III, IV, VI and VII to dismiss Plaintiffs' lawsuit for lack of subject matter jurisdiction, pursuant to FRCP 12(b)(1), or, in the alternative, to dismiss Plaintiffs' Fifth Claim for Relief for violation of the Sherman Act, came regularly for hearing on August 16, 1999, in Courtroom 21, the Honorable Ronald S. Lew, Judge Presiding. Eric L. Troff, Esq., of Musick, Peeler & Garrett

LLP, appeared on behalf of the Moving Party Defendants. Terence C. Gill, Esq., of Brownstein, Hyatt, Farber & Strickland, P.C., and Alex H. Cherin, Esq., of Manning, Marder & Wolfe, appeared on behalf of Plaintiffs.

The Court granted Defendants' Motion to Dismiss Plaintiffs' Fifth Claim for Relief for violation of the Sherman Act, pursuant to FRCP 12(b)(6), with prejudice, on the ground that Plaintiffs failed to state a claim upon which relief could be granted. The Court dismissed Plaintiffs' remaining First, Second, Third and Fourth state Claims for Relief, without prejudice.

DATED: 8-24-99

s/ [illegible]
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX C — COMPLAINT DATED MARCH 19, 1999 AND FILED APRIL 9, 1999

BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.
Terence C. Gill, SBN 120555
410 17th Street
Suite 2100
Denver, CO 80202
Phone: (303) 534-6335
Fax: (303) 623-1956

MANNING, MARDER & WOLFE
Anthony J. Ellrod, SBN 136574
Alex H. Cherin, SBN 182087
707 Wilshire Blvd.
45th Floor
Los Angeles, CA 90017
Phone: (213) 624-6900
Fax: (213)

Attorneys for Plaintiffs
LANDMARK CAPITAL II, LLC
A Colorado limited liability company and
ROBERTA K. LOWERY

Appendix C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 99-03851 DT (RZx)

LANDMARK CAPITAL, II, LLC, a Colorado limited liability company, and ROBERTA K. LOWERY,

Plaintiffs

vs.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III, a California limited partnership; CAL-AMERICAN PROPERTY FUND, IV, a California limited partnership; CAL-AMERICAN PROPERTY FUND VI, a California limited partnership; CAL-AMERICAN PROPERTY FUND VII, a California limited partnership; and DOES 1 through 10, inclusive,

Defendants

COMPLAINT FOR:

(1) BREACH OF CONTRACT

(2) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(3) DECLARATORY RELIEF

Appendix C

(4) VIOLATION OF THE SHERMAN ANTI-TRUST ACT

(5) INJUNCTIVE RELIEF

Plaintiffs Landmark Capital II, LLC ("Landmark II") and Roberta K. Lowery, by and through their attorneys, Brownstein Hyatt Farber & Strickland, P.C. and Manning Marder & Wolf, allege as their Complaint against Defendants, as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over the claims by Landmark against all defendants pursuant to 28 U.S.C. § 1332 based on diversity of citizenship and the amount in controversy: Landmark is a citizen of the state of Colorado and Ms. Lowery is a citizen of the State of Louisiana, whereas each defendant is a citizen of the State of California. Moreover, the amount in controversy between Landmark and defendants (exclusive of interest and costs) exceeds the sum of $75,000.

2. This Court also has jurisdiction over the claims of all parties pursuant to 28 U.S.C. 1331 as the action arises under Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. Accordingly, the Court also has supplemental jurisdiction of the plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(1) and (2) because all defendants

reside in this District and the events giving rise to plaintiffs' claims occurred in this District.

GENERAL ALLEGATIONS

4. Plaintiff Landmark II is a Colorado limited liability company with its principal place of business in Denver, Colorado and is a resident of the State of Colorado.

5. Plaintiff Roberta K. Lowery is an individual residing in and is a resident of the State of Louisiana. Ms. Lowery acquired limited partnership Class B units in defendant CAL-AMERICAN PROPERTY FUND III ("FUND III") on or about January 17, 1975, limited partnership class A units in CAL-AMERICAN PROPERTY FUND IV ("FUND IV") on or about November 8, 1978, limited partnership Class B units in FUND IV on or about June 18, 1976, limited partnership Class B units in CAL-AMERICAN PROPERTY FUND VI ("FUND VI") on or about June 23, 1978 and limited partnership Class B units in CAL-AMERICAN PROPERTY FUND VII ("FUND VII") on or about December 29, 1978. Ms. Lowery invested in the partnership units for retirement purposes. Ms. Lowery's husband, with whom she purchased the partnership units is now deceased. Ms. Lowery has been unsuccessfully attempting to finalize the sale of her units for over a year.

6. Landmark II is informed and believes and thereon alleges that at all times mentioned herein, defendant Hameetman was and is an individual doing business in Los Angeles (Century City), California and is a resident of the State of California.

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7. Landmark II is informed and believes and thereon alleges that at all times mentioned herein, Defendant Hameetman was the general partner of Fund-III, Fund-IV, Fund VI and Fund VII (collectively, the "Partnerships").

8. The Partnerships were each organized under California law, and each is governed by a written Partnership Agreement. Each Partnership is organized under the laws of, has its principal place of business in and is a resident of, the State of California.

9. Each of the Partnership Agreements provides at Section I thereof that the Partnership shall be governed by the California Uniform Limited Partnership Act.

10. Each of the Partnership Agreements provides at Section 21 thereof that the general partner may not unreasonably withhold his consent to the assignment of limited partner interests and the admission of said interests as substitute limited partners, so long as the assignor and the proposed assignee perform certain tasks and agree to certain terms, including, *inter alia,* execution of an instrument of an assignment, the conveyance of a power of attorney, an agreement by the assignee to comply with the partnership agreement, and the payment of certain costs incurred with effecting the change.

11. On or about December 8, 1998, Ms. Lowery executed five Agreements of Transfer (the "1998 Agreements of Transfer"). Pursuant to these 1998 Agreements of Transfer, Landmark II agreed to acquire from existing limited partner Roberta K. Lowery certain interests in the Partnerships as follows (the "Lowery Units"):

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5 Class B units in Fund III

6 Class A units in Fund IV

5 Class B units in Fund IV

10 Class B units in Fund VI

5 Class B units in Fund VII

These Agreements of Transfer are all similar to prior agreements of transfer that were submitted to the General Partner but objected to on numerous and baseless grounds.

12. On or about December 8, 1998, Landmark II paid for the Lowery Units by delivery of a check in the amount of $8,125.00. Ms. Lowery has cashed this check.

13. Landmark II is attempting to purchase these units and become a substitute limited partner for investment purposes. Once it becomes a substitute limited partner, it anticipates making additional purchases of units from other limited partners in the Partnerships and otherwise to communicate with other limited partners concerning such offers. Landmark II may also seek to communicate with the other limited partners regarding the manner in which the general partner is managing the Partnerships.

14. On or about December 15, 1998, Landmark II delivered a true and correct copy of the 1998 Agreements of Transfer to the Funds, with a copy to their attorneys, and requested that the Funds accept these documents and take

the appropriate actions to make Landmark II a Substitute Limited Partner and remove Ms. Lowery from the Fund's records. On or about December 28, 1998, the Funds' attorneys responded by refusing to permit such a substitution.

15. These Agreements of Transfer are similar to prior agreements entered into by Landmark Capital LLC (an entity affiliated by common ownership with Landmark II), and Ms. Lowery. For over one year, the Plaintiffs have been attempting to placate the General Partner by submitting documentation acceptable to it. Each time such documents were submitted, the General Partner would refuse to accept the documentation and allow Landmark to be a substitute limited partner.

16. In a final effort to satisfy the general partner, Landmark II submitted revised documents to the general partner on or about March 25, 1999. Plaintiffs have received no response to these documents. Indeed, in conversations with the general partner's counsel, the defendants have made it very clear that they would not allow Landmark to become a substitute limited partner regardless of the format or number of documents submitted to it. At best, the defendants would allow Landmark to have the status as an assignee, a status that it already has as a matter of law.

17. Pursuant to Fed. R. Civ. Proc. 9(c), Landmark II generally alleges that all of the conditions of the Partnership Agreements for a transfer have either been met by Landmark II or waived by Defendants and it is entitled to be treated as an assignee of the Lowery units and to be admitted as a substitute limited partner in the Partnerships with respect to such units.

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18. Specifically, each of the Partnership Agreements at Section 21 thereof, states:

> . . . [N]o assignee of the whole or any portion of a Limited Partner's interest in the Partnership, shall have the right to become a substituted Limited Partner in place of his assignor, unless (i) his assignor shall designate such intention in the instrument of assignment; (ii) the written consent of the General Partner in his sole discretion to such substitution shall be obtained, which consent will not be unreasonably withheld and will not be deemed to have been unreasonably withheld if the General Partner determines that such sale or transfer may jeopardize the continued ability of the Partnership to qualify as a "partnership" for federal income tax purposes; (iii) the assigned instrument shall be in form and substance satisfactory to the General Partner; (iv) the assignor and assignee named therein shall execute and acknowledge such other instrument or instruments as the General Partners may deem necessary or desirable to effectuate such admission, including but not limited to a power of attorney with provisions more fully described in this Agreement; (v) the assignee shall accept and adopt and approve in writing all of the terms and provisions of this Agreement, as the same may have been amended; (vi) such assignee shall pay or, at the election of the General Partner, obligate himself to pay all reasonable expenses connected with such admission, including but not limited to the

> cost of preparing, filing and publishing any amendment of the Certificate of Limited Partnership to effectuate such admission; provided, however, that such expenses to be paid by a limited Partner shall not exceed $50.00; (vii) such assignee shall obtain, if necessary, the written consent of the California Corporations Commissioner to such transfer; and (viii) such assignee shall have received an opinion of counsel satisfactory to the General Partner for the Partnership that such transfer does not violate the registration provisions of the securities act of 1933, as amended.

As to clause (i), the 1998 Agreements of Transfer state on their face Ms. Lowery's intention that Landmark II be made a substitute limited partner. As to clause (ii) the General Partner has not provided his consent to the transfer. However, all documents and actions that are reasonably necessary and appropriate to the transfer have been provided to the General Partner and there is no good faith, reasonable, equitable or contractually permissible basis for the General Partner to withhold his consent to this transfer such that his withholding consent is not reasonable and constitutes a breach of his obligations under the Partnership Agreements, a breach of his express and implied duty of good faith and fair dealing under those agreements, a breach of his fiduciary duty to Lowery, as a limited partner in the Funds, and the intentional creation and maintenance of a monopoly over the purchase of Fund units in violation of the Federal antitrust laws. As to clause (iii), the 1998 Agreements of Assignment contain all the provisions reasonably necessary to effectuate

the assignment of the Lowery Units and Landmark II and Ms. Lower are unaware of any legitimate issue or objection to the form of the assignments by Defendants. As to clause (iv), Landmark II and Lowery have always been ready, willing and able to execute all additional documents that are reasonable and necessary to the assignment in question. Indeed Landmark has submitted a power of attorney to the defendants. The General Partner has made demands that Landmark II execute documents that are both unreasonable and unnecessary to such transfer, including a demand that Landmark II agree in writing that it can never exercise the rights of a substitute limited partner — including voting rights — if the assignment takes place. Again, all documents and actions that are reasonably necessary and appropriate to the transfer have been provided to the General Partner and there is no good faith or reasonable basis for the General Partner to withhold his consent to this transfer such that his withholding consent is not reasonable and constitutes a breach of his obligations under the Partnership Agreements, a breach of his express and implied duty of good faith and fair dealing under those agreements and a breach of his fiduciary duty to Ms. Lowery. As to clause (v), Landmark II and Lowery satisfied this condition by executing the 1998 Agreements of Assignment pursuant to which Landmark II expressly undertakes this obligation. As to clause (vi), Landmark II has always been ready, willing and able and has offered to pay the reasonable expenses of the assignment, as limited by this clause. As to clause (vii), Landmark II's attorneys have consulted relevant California law and determined that no consent by the California Commissioner of Corporations to this transfer is necessary. Landmark II has heard no basis as to why this legal determination is

incorrect from Defendants. As to clause (viii), Landmark II delivered an opinion of its securities lawyers, persons with years of experience in such matters, to the effect that the transfer in question does not violate he registration provisions of the Securities Act of 1933, as amended and Landmark II has received no objection to this opinion from Defendants.

19. On or about December 15, 1998, Landmark II requested that the Funds each provide it with the list of names and addresses of the other limited partners in the Partnerships. To date, Defendants have refused to provide such lists.

FIRST CAUSE OF ACTION

(Breach of Contract — Landmark II and Lowery Against Fund III, Fund IV, Fund VI and Fund VII)

20. Landmark II and Lowery incorporate by this reference the allegations of paragraphs 1 through 19.

21. Pursuant to Section 21 of the Partnership Agreements, Defendants were required to admit Landmark II as a substitute limited partner in the Partnerships. Defendants, however, have refused to admit Landmark II as a substitute limited partner in place of Ms. Lowery in any of the Partnerships, or to provide Landmark II with a list of the names and addresses of the other limited partners in the Partnerships once it was so admitted, as it is required to do for all limited partners. By refusing to do so, Defendants have breached the Agreements. Lowery, as a limited partner in the Partnerships, is a party to the Partnership Agreements.

Landmark II, as a proposed substitute limited partner, is a third-party beneficiary of the Agreements.

22. Unless Landmark II is able to exercise its full rights as a substituted limited partner, including (a) being able to communicate with other limited partners concerning the possible purchase by Landmark II of additional units in the Partnerships, (b) being able to communicate with other limited partners concerning the manner in which the general partner is running the Partnerships, (c) being able to communicate with other limited partners concerning the scheduling of a special meeting pursuant to Section 49 of the Agreements, and (d) being able to vote his units, Landmark II will be permanently and irreparably damaged by, among other things, not being able to obtain the full value of its investment and potential additional investments in the Partnerships. Moreover, by not allowing the substitution of Landmark II in place of Ms. Lowery, Ms. Lowery has been damaged in that the finality of her transfer has been put into question.

23. As a proximate result of Defendants' actions, Landmark II has been damaged in an amount to be proved at trial. These damages stem from Landmark II's current and potential investment in the partnerships at issue. The amount of Landmark's damages is not currently known but will be determined through discovery and investigation in preparation for trial. The damages are, however, believed to be in excess of $75,000.

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SECOND CAUSE OF ACTION

(Breach of Express and Implied Covenants of Good Faith And Fair Dealing — Landmark II and Lowery Against Fund III, Fund IV, Fund VI and Fund VII)

24. Landmark II and Lowery incorporate by this reference the allegations of paragraphs 1 through 22 herein.

25. The Partnership Agreements, like any contract under California law, contain a covenant of good faith and fair dealing by implication. Moreover, these agreements contain an express covenant requiring the general partner to not act unreasonably in approving the transfer of partnership units.

26. The Partnerships have breached both this express covenant and the implied covenant of good faith and fair dealing by unreasonably withholding their consent to the transfer of the partnership units from Ms. Lowery to Landmark II. As discussed above, Landmark II and Lowery have taken all actions and executed all documents that are reasonable and necessary to the transfer of the partnership units. The Partnership's refusal to admit Landmark II as a substitute limited partner is therefore not based on any good faith concern but, rather, is based solely on the self-interest of the Partnership's general partner defendant Hameetman. As discussed in more detail below, Mr. Hameetman has systematically prevented any transfer of units in the Partnerships in order to protect his position as general partner, preventing any unit holder or group of unit holders from obtaining a significant ownership interest in the partnerships which would allow those holders to have

a greater say over the partnerships in their capacity as limited partners. By keeping the limited partners separated and ununified, Hameetman has been able to retain his position as the general partner, earning management fees even though in most cases little or no dividends have been paid to limited partners and even though the fair market value of their investment has been dramatically reduced. Hameetman has also been able to personally benefit by acquiring partnership units at depressed values, values that are depressed solely due to Hameetman's own actions in inhibiting the development of a more liquid market for the purchase of partnership units.

27. As a proximate result of Defendants' actions, Landmark II and Lowery have been damaged in an amount to be proved at trial. Landmark II's damages stem from Landmark II's investment and potential investments in the partnerships at issue. Unless Landmark II is made a substitute limited partner, it will be unable to protect its investment, through voting at partner meetings, communicating with other limited partners and, possibly, acquiring additional partnership interests to enhance its influence in the partnership and thereby protect its interests better. The amount of damages is not currently known but will be determined through discovery and investigation in preparation for trial. These damages are, however, believed to be in excess of $75,000. Lowery's damages are based on the fact that by not allowing the substitution of Landmark II in place of Ms. Lowery, the finality of her transfer has been put into question.

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THIRD CAUSE OF ACTION

(Declaratory Relief (CCCP § 1060) — Landmark II and Lowery Against All Defendants)

28. Landmark II and Ms. Lowery incorporate by reference the allegations of paragraphs 1 through 27.

29. Landmark II, Ms. Lowery and Defendants are each interested in the construction of the 1998 Agreements of Transfer and the Partnership Agreements for Fund III, Fund IV, Fund VI and Fund VII which documents constitute instruments and/or contracts under California Code of Civil Procedure Section 1060.

30. As set forth above, there exists an actual case and controversy regarding the legal rights and duties of the respective parties. This case and controversy is ripe for a declaration by this Court of the respective parties' rights and duties in the premises, including a determination of any question of construction or validity arising under the 1998 Agreements of Transfer and the Partnership Agreements for Fund III, Fund IV, Fund VI and Fund VII.

31. Specifically, Landmark II seeks a declaration that under the facts and circumstances of this case and under the provisions of the Partnership Agreements, Mr. Hameetman as general partner of Fund III, Fund IV, Fund VI and Fund VII has breached the provisions of the Partnership Agreements by not admitting Landmark II as a substitute limited partner in Fund III, Fund IV, Fund VI and Fund VII. Landmark II further seeks a declaration stating what actions

need be taken or documents executed by Landmark II to fully satisfy the conditions of paragraph 21 of the Partnership Agreements to become a substitute limited partner in the event that the Court concludes that all necessary and reasonable actions have not yet been taken by Landmark II.

FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty — Lowery Against Hameetman)

32. Lowery incorporates by reference the allegations of paragraphs 1 through 31.

33. As general partner of the Partnerships, Defendant Fred Hameetman owes a fiduciary duty to each limited partner in the Partnerships. Ms. Lowery is such a limited partner. Moreover, the Partnership Agreements specifically provide that the "General Partner shall have fiduciary responsibility for the safekeeping and use of all funds and assets of the Partnership, whether or not in his immediate possession or control. . . ." This fiduciary duty includes the duty to manage the Partnerships with reasonable care and to act in the best interests of the limited partners. It prohibits the General Partner from acting in his own self-interest to the detriment of the limited partners.

34. Defendant Hameetman has breached his fiduciary duty to Ms. Lowery by acting solely in his own interests at the expense of her and other limited partners. The General Partner's primary duty is to maximize the value of the limited partners', including Ms. Lowery's, investment. Thus, the General Partner's goals ought to have included allowing

a more efficient market for the transfer of her partnership units to exist within the confines of applicable law. Instead, Mr. Hameetman has systematically thwarted any attempt at the creation of such a market. Most recently, Mr. Hameetman has blocked Ms. Lowery's transfer of units to Landmark II. Unless this transfer is permitted, there will remain uncertainty as to finality of this transaction for Ms. Lowery and Ms. Lowery will continue to have to account for these investments in her income taxes, a complex task. Moreover, Mr. Hameetman's thwarting of the development of a competitive market has drastically reduced the market value of Ms. Lowery's units, resulting in substantial damages to her.

35. On information and belief, there are several reasons why Hameetman has thwarted any effort of Ms. Lowery to transfer her units. First, Mr. Hameetman, by preventing the creation of a market for the Partnership units to develop, intends to personally benefit. While refusing to transfer the units to Landmark II, Hameetman has purchased units from other limited partners in most cases *at a substantial discount to the amount paid by Landmark II.* Thus, Hameetman, through his control of the partnerships, has eliminated any competitive bidding for these units, allowing him to purchase them at values well below prices paid by Landmark and below prices that would arise in a more efficient market for these securities. Moreover, even the price that Ms. Lowery has agreed to sell her units to Landmark II for represents a depressed value. If the General Partner had been acting in the best interests of the limited partners and not for his own personal gain, a more efficient market would have developed, increasing the market value for these interests. Due to the General Partner's systematic prevention of any such market

from developing, Landmark II is one of the few, and perhaps the only, investor that has been able to locate Ms. Lowery.

36. In addition to enabling the General Partner to acquire units at depressed prices, the General Partner's refusal to allow transfers has enabled him to maintain his elected position as general partner even though his stewardship is not always in the best interests of the limited partners. Ms. Lowery purchased her units many years ago. Nevertheless, the current market value of her units is only a fraction of what she paid for them. While the value of her units have deteriorated, the General Partner has continued to collect management fees for himself. By prohibiting transfers of units, the General Partner has prevented any effective communication among limited partners and has prevented any "activist" limited partners from acquiring more units and holding meetings to have the General Partner account for his actions. All of these efforts have enabled the General Partner to remain General Partner for years, notwithstanding a dismal financial record.

37. As a direct consequence of the General Partner's breach of his fiduciary duties, Ms. Lowery has been damaged. But for the General Partner's misconduct, the market value of the Partnership units would have been significantly higher than that paid by Landmark II. Ms. Lowery is entitled to recover both the actual amount of these damages as well as punitive damages and reasonable attorneys fees.

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FIFTH CAUSE OF ACTION

(Monopolization and Attempted Monopolization — All Plaintiffs Against All Defendants)

38. Lowery incorporates by reference the allegations of paragraphs 1 through 37.

39. For any business entity for which ownership is subdivided into discreet, transferable interests, including corporations, partnerships and limited liability companies, there exists a market for the purchase of the ownership interests in that entity. While some such entities are large and the respective market for the purchase of its ownership interests is highly competitive and diverse (e.g., the market for the purchase of shares in IBM in which there are literally thousands, if not millions of participants), other business entities, due to their small size and lack of a public market, have a smaller, less efficient market. However, each entity has such a market.

40. Like other business entities, for each of the Funds, there exists a market for the purchase of limited partnership units of the Fund. Plaintiffs are informed and believe, and thereon allege, that the market for purchasing units in each of the Funds consists almost exclusively of defendant Hameetman, acting individually or in his capacity as general partner of each of the Funds. Holders of limited partners may reside across the United States and accordingly the geographic market could be considered national in scope. The "product market" consists of the market for partnership interests in the Funds. Hameetman has acquired and

maintained his exclusive or near-exclusive market share by a series of uncompetitive acts. First, Hameetman uses his power as general partner to keep the market for purchase of Fund units very thin. Hameetman does this by using his power as the gatekeeper under the partnership agreements to prevent any investor from acquiring a significant stake in the partnerships. Second, as a result of minimizing the efficiency of the market for purchase of Fund units, owners of those units such as Ms. Lowery contact the general partner to complain about the situation. Hameetman and the partnerships he controls then take advantage of this situation by offering to purchase the units themselves. Because Hameetman and or the partnerships are typically the only available purchaser (due to the fact that other potential competitors such as Landmark II are barred from entry by the acts of the General Partner), Hameetman is able to acquire the units at substantial discounts from their true value.

41. In addition to generally inhibiting the natural creation of an efficient market in the Fund units, Hameetman uses his capacity as general partner to prevent any proposed purchase of limited partnership interests from being finalized, and thus preventing any potential competitors for these units from entering the relevant market, by withholding his consent to any such transfer. Pursuant to each partnership agreement, the General Partner cannot be unreasonable in withholding consent. By arbitrarily and unreasonably withholding his consent to transfers of partnership interests, Hameetman effectively eliminates all other potential competitors from the market for Fund units, thereby resulting in a monopoly.

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42. The mechanism set forth in each of the partnership agreements whereby the General Partner is required to reasonably consent to the substitution of new limited partners for partners seeking to sell their shares constitutes an essential facility the control of which by Hameetman effectively makes it impossible for Landmark to compete in the market for purchases of Fund units. In order to compete at all, Landmark must be able to be treated equitably and properly under the terms of the partnership agreements. By unilaterally and unreasonably withholding consent to a transfer allowing a buyer to become a substitute limited partner, Hameetman bars all entry into the marketplace leaving the market for himself alone.

43. Even if the defendants' actions did not result in monopolization as described above, their acts and intent to establish and maintain monopoly power did result in a dangerous probability that monopolization would succeed.

44. As a direct and proximate result of defendants' conduct, Landmark has suffered damages consisting of lost profits, lost opportunity costs, out-of-pocket expenses and other damages to be determined at trial.

45. As a direct and proximate result of defendants' conduct, Ms. Lowery has suffered damages consisting of lost profits, lost opportunity costs, out-of-pocket expenses and other damages to be determined at trial.

Pursuant to the federal antitrust laws, Landmark and Ms. Lowery are entitled to injunctive relief, treble damages and reasonable attorney's fees.

WHEREFORE, Landmark II and Lowery pray for judgment against Defendants, and each of them, as follows:

46. For a judicial determination that Defendants have no basis on which to refuse Landmark II's admission as a full substitute limited partner in the Partnerships or to refuse to provide Landmark II with a partner list for the Partnerships.

47. For a judicial determination stating what actions need be taken or documents executed by Landmark II and/or Ms. Lowery in the event that the Court concludes that all necessary and reasonable actions have not yet been taken by Landmark II in order for it to be substituted as substitute limited partner and Ms. Lowery removed as a limited partner.

48. For an order by way of permanent injunction or otherwise, requiring Defendants to approve the transfer of units in Fund III, Fund IV, Fund VI and Fund VII from Roberta Lowery to Landmark II, and admit Landmark II as a full substitute limited partner in each of the forgoing partnerships.

49. For an order by way of permanent injunction or otherwise, requiring Defendants, upon admission of Landmark II as a limited partner in Fund III, Fund IV, Fund VI and Fund VII, to turn over to Landmark II, within three days, on computer diskette, the current list of the names, addresses, telephone numbers, and ownership interests (*i.e.*, the class of units and the number of such units) for both classes of the limited partners in Fund III, Fund IV, Fund VI and Fund VII, and the annual and quarterly reports for the Partnerships for the last five years.

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50. For an award of damages to Landmark II, based on defendants' breach of contract and breach of the express and implied covenants of good faith and fair dealing, in an amount to be determined at trial.

51. For an award of actual damages to Ms. Lowery, based on defendants' breach of contract and breach of their express and implied covenants of good faith and fair dealing and actual and punitive damages based on defendant Hameetman's breach of his fiduciary duties owed to Ms. Lowery as a limited partner in the partnerships.

52. For an award of injunctive relief as described above, treble damages, costs and attorneys fees to Lowery and Landmark on their Federal Antitrust claim against Hameetman and the partnerships.

53. For costs, interest, attorneys fees and for such other and further relief as the Court deems proper.

Dated: March 19, 1999

BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.

By: s/ Terence C. Gill
Terence C. Gill
Attorneys for Plaintiffs
LANDMARK CAPITAL, LLC,
LANDMARK CAPITAL II, LLC,
and ROBERTA K. LOWERY

Supreme Court, U.S.
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No. 00-1850

IN THE

Supreme Court of the United States

LANDMARK CAPITAL II, LLC
and ROBERTA K. LOWERY,

Petitioners,

v.

FRED HAMEETMAN; CAL-AMERICAN PROPERTY FUND III; CAL-AMERICAN PROPERTY FUND VI; CAL-AMERICAN PROPERTY VII; and CAL-AMERICAN PROPERTY FUND IV,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

WILLIE R. BARNES
MUSIC, PEELER & GARRETT LLP
One Wilshire Boulevard
Suite 2000
Los Angeles, CA 90017
(213) 629-7600

ERIC L. TROFF
Counsel of Record
GIBBS, GIDEN, LOCHER
& TURNER LLP
2029 Century Park East
34th Floor
Los Angeles, CA 90067
(310) 734-3324

Attorneys for Respondents

168055

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Under federal antitrust law, can a monopoly exist if one who is denied access to a particular market has reasonably interchangeable alternatives available?

2. Under federal antitrust law, is every limited partnership its own product market, or does the product market consist of all reasonable interchangeable investment alternatives?

3. Under federal antitrust law, is an illegal monopoly created when an investor in a limited partnership agrees in the limited partnership agreement that while he/she may resell his/her limited partnership units to a third person, such purchaser will only become a substitute-limited partner if the general partner, in the reasonable exercise of his discretion, consents?

4. Under federal antitrust law, is there an antitrust injury sufficient to support a claim of an illegal monopoly if the purported monopolistic act does not adversely affect competition, as a whole, in the relevant market?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Respondents are Cal-American Income Property Funds III, IV, VI and VII, California limited partnerships. Respondent Fred Hameetman is the General Partner of these Funds.

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I.

STATEMENT OF THE CASE

This case arises out of the routine application of one of the most basic principles of federal antitrust law. In determining whether there has been a violation of Section 2 of the Sherman Act (which prohibits the monopolization of a relevant market), a court must first define the relevant market. In this respect, it has been firmly established by this Court that a particular product cannot be its own relevant market if there are reasonably interchangeable substitutes available.

In the present case, Petitioner Landmark Capital II, LLC ("Landmark II") is attempting to "carry the banner" of an unsuccessful lawsuit commenced by its predecessor, Landmark Capital I, LLC ("Landmark I"). The procedural history of the underlying matter reveals the frivolous, last minute creation of Landmark II's antitrust allegations and demonstrates why the dismissal of this claim for Landmark II's failure to allege a cognizable relevant market, fails to merit United States Supreme Court review.

This case began with Landmark I's contention that after it purchased a few token limited partnership units in Cal-American Income Property Funds III and IV (the "Funds") from limited partner Roberta Lowery, it should have been made a substitute-limited partner therein, automatically. As a substitute-limited partner, Landmark I's goals were to obtain a list of the names and residential addresses of all investors in the Funds, make them tender offers, buy them out and remove Fred Hameetman as the General Partner. With control of the Funds, Landmark I could

either reap the profits when the limited partnerships expired, or cause the Funds to dissolve earlier, or cause a sale of the Funds' assets prior to dissolution, depending on Landmark I's financial objectives.[1]

The Funds' General Partner, however, exercised his reasonable discretion under the Limited Partnership Agreements and declined to admit Landmark I as a substitute-limited partner. Thereafter, Landmark I filed a Complaint against Funds III and IV and their General Partner on June 5, 1998 in the Los Angeles County Superior Court. This Complaint contained four causes of action for: 1) breach of contract; 2) breach of the implied covenant of good faith and faith dealing; 3) breach of fiduciary duty; and 4) declaratory relief. On August 26, 1998, Landmark Capital I voluntarily filed a First Amended Complaint alleging the same four causes of action.

Because Landmark I had no contractual relationship with the Funds or their General Partner, the court dismissed Landmark I's first three causes of action, *without leave to amend*. The court then gave Landmark I leave to file an amended complaint realleging its fourth cause of action for declaratory relief, only.

On December 31, 1998, Landmark I filed a Second Amended Complaint which named Landmark II and Roberta K. Lowery, *as additional Plaintiffs*, and Funds VI and VII, *as additional Defendants*. This Second Amended Complaint contained the same four causes of action.

---

1. Under California law, a list of investors is only available to limited or substitute limited partners.

Because one of the grounds for the earlier Demurrer was that Landmark I had failed to pay Ms. Lowery for her units, Respondents had argued that Landmark was not even entitled to become an economic assignee, let alone a substitute-limited partner. Thus, Landmark II was formed specifically to purchase and pay for a few token units from Ms. Lowery in Funds III and IV (and also Funds VI and VII), so as to remove this objection. Roberta Lowery was a nominal party dragged into this lawsuit to "prop up" the breach of contract claims with the allegation that even if Landmark I and II did not have a direct contractual relationship with the Funds and their General Partner, Ms. Lowery did.

Landmark II's objectives were the same as Landmark I's; that is, to make tender offers, remove the General Partner and gain control of the Funds. Indeed, as Landmark II admits, the heart of its alleged antitrust injury is "being precluded from participating in a potentially lucrative market." (Landmark's Opening Brief to the Ninth Circuit, p. 18, lns. 13-14.)

On March 12, 1999, the Funds and their General Partner brought a Demurrer to the Second Amended Complaint on the ground that because Landmark I had only been given leave to reallege its fourth cause of action for declaratory relief, there was no authority to file a Second Amended Complaint naming additional Plaintiffs and Defendants. The court agreed and sustained the Demurrer, with prejudice, as to Landmark I's claims and, without prejudice, as to the claims of Landmark II and Ms. Lowery.

At this point, Landmark II (hereafter for simplicity's sake, "Landmark") and Roberta Lowery, apparently leery of filing a third complaint in California state court before

the same Judge, opted to a re-file the same four claims in the Federal District Court, Central District of California, with a new claim alleged against the Funds and their General Partner for a violation of Section 2 of the Sherman Act, as their "ticket" to the courthouse. In essence, Landmark and Mrs. Lowery alleged that by refusing to admit Landmark as a substitute-limited partner, the Funds and their General Partner were operating an illegal monopoly.

On March 17, 1999, the Funds and their General Partner brought a Motion to Dismiss this Complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) (*i.e.*, a lack of complete diversity between the parties) or, alternatively, to dismiss the antitrust claim for failure to state a claim upon which relief could be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

In analyzing whether there had been an antitrust injury in the relevant market, the District Court did *not* adopt Landmark's extraordinary, but erroneous, point of view, that every potential business opportunity is its own relevant market and that every lost business opportunity is its own separate antitrust violation, especially as Landmark, whose very business is to purchase limited partnership units all across the United States, had reasonable investment alternatives available. Nor did the court accept Landmark's egocentric claim that it had suffered antitrust injuries simply because its own personal desires could not be met.

As to Ms. Lowery, the District Court correctly ruled that she had no antitrust claim, either, as her inability to demand that the buyer of her units be admitted as substitute-limited partner was strictly limited by contract (*i.e.*, the Limited

Partnership Agreements). Absent a legitimate federal question, all remaining pendent state claims were dismissed.[2]

On March 11, 2001, the Ninth Circuit Court of Appeals affirmed this Judgment, agreeing that Landmark and Ms. Lowery had failed to state facts alleging a "cognizable relevant market" for antitrust purposes. As set forth below, this Decision is correct and does not warrant review by the United States Supreme Court.

II.

REASONS FOR DENYING THE WRIT

In a transparent attempt to grab this Court's attention, Landmark contends that the Ninth Circuit's ruling has added to a "glaring split" of authority between the federal courts on whether securities can be the subject of antitrust regulation. In truth, the issue of whether securities can be subject to antitrust regulation was *never an issue that was presented to or even addressed by either the District Court or the Ninth Circuit*. Instead, as previously stated, the fulcrum issue was whether Landmark had alleged facts defining a plausible relevant market. This is the same threshold issue that must be reached in any antitrust case, regardless of whether the product in that market is a security or some other commodity.

In performing this analysis, the District Court simply applied this Court's ruling in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S. Ct. 994, 1012

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2. Landmark conceded that jurisdiction could not be based on diversity.

(1956) that the relevant market "is composed of products that have reasonable interchangeability." Because Landmark, as an entity whose very business is to purchase limited partnership units across the United States, had other reasonably similar investment opportunities available (*i.e.*, Landmark could simply purchase limited partnership units and potentially become a substitute-limited partner in other limited partnerships), the court correctly concluded that Landmark was not excluded from the relevant market and, therefore, did not suffer any antitrust injury.

In affirming this Decision, the Ninth Circuit, also cited page 927 of *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 576 F. Supp. 922 (D. Del. 1983) and page 436 of *Queen City Pizza, Inc. v. Domino's Pizza*, 134 F.3d 430 (3d Cir. 1997). Both of these pages reiterate this Court's prior holdings that a relevant market must include reasonably interchangeable substitutes. Neither case was cited by the Ninth Circuit for the proposition that securities can never be the subject of antitrust regulation, nor did either opinion so hold.

The ruling on page 436 of *Queen City Pizza* that there can be no antitrust violation where access to a product is determined by a contract, is further support for the dismissal of Ms. Lowery's claims. Once again, Ms. Lowery's inability to demand that a purchaser of her units become a substitute-limited partner is a matter of state contract, not federal antitrust law.

In short, notwithstanding Landmark's disingenuous presentation, there is no "glaring split" of authority between the Circuits. All are in agreement as to the correct criteria to be used in analyzing the relevant market.

Furthermore, the Ninth Circuit's Opinion does not affect, nor will it affect," thousands of investors," as Landmark claims. This Decision affects only Landmark, which is simply disgruntled because its "take over" plan for the Funds did not succeed.

Absent a legitimate conflict between the Courts of Appeal, or an important and unresolved issue of federal law, Landmark's Petition does not meet the criteria for review and should be denied.

III.

LANDMARK'S MISSTATEMENTS OF FACT AND LAW

Pursuant to United States Supreme Court Rule 15(a) Respondents note that Landmark has made the following misstatements of fact and/or law to this Court:

Misstatement:

> The Ninth Circuit concluded as a matter of law that a single buyer of securities *could never* monopolize the market for a company's securities by wilfully excluding all other buyers. (Landmark's Question Presented No. 1.) (Italics added.)

Truth:

> The Ninth Circuit merely ruled that, under the facts of *this case*, Landmark had failed to allege the monopolization of a cognizable relevant market.

Misstatement:

The Ninth Circuit ruled as a matter of law that a market consisting of a single company's securities *could not under any circumstances* constitute a relevant market for federal antitrust purposes. (*Id.*, No. 2.) (Italics added.)

Truth:

The Ninth Circuit merely ruled that under the facts of *this case*, Landmark had failed to allege the monopolization of a cognizable relevant market.

Misstatement:

The Ninth Circuit concluded that *thousands of investors* holding securities in thinly traded limited partnerships have no recourse under the federal antitrust laws when a single buyer wilfully excludes all other buyers. (*Id.*, No. 3.) (Italics added.)

Truth:

The Ninth Circuit merely ruled that *one investor*, Roberta Lowery, had no antitrust claim, as her demand that Landmark become a substitute-limited partner after purchasing her units was a matter of state contract, not federal antitrust law.

Misstatement:

> The Third Circuit held in *Kalmanovitz v. G. Heileman Brewing Co., Inc.*, 769 F.2d 152 (3d Cir. 1985) that a market consisting of a single company's securities *could not under any circumstances* constitute a relevant market for federal antitrust purposes. (*Id.*, No. 2.) (Italics added.)

Truth:

> The Third Circuit merely followed the well-known rule established by this Court that the relevant market is defined by the "cross-elasticity" of a product; that is, whether reasonable alternatives to a product are available. (*See Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24 (1962) and *du Pont de Nemours, supra*, at 404, 76 S. Ct. 994, 1012.)

Additionally, Landmark has falsely insinuated that the District Court committed error in failing to issue any written or oral findings of fact and conclusions of law in support of its ruling. (Pet., p. 5, ¶ 3.) Fed. R. Civ. P. 52(a) makes plain that: "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 . . . ."

Finally, Landmark has erroneously and disrespectfully stated that the Ninth Circuit "attempted to avoid the task of careful factual inquiry" (Pet., p. 14, Conclusion), when it was undisputed that Landmark is an entity whose business is purchasing limited partnership units across the United States and, thus, had reasonably interchangeable investment

alternatives available. Under the circumstances, no further factual inquiry was necessary, as the only remaining issues were those of law (*i.e.*, based on the undisputed facts, had Landmark alleged a cognizable relevant market?, etc.) (*See* Respondents' Questions of Law, *supra*.)

IV.

CONCLUSION

For all the foregoing reasons, this Honorable Court should deny the Petition.

Respectfully submitted,

WILLIE R. BARNES
MUSIC, PEELER & GARRETT LLP
One Wilshire Boulevard
Suite 2000
Los Angeles, CA 90017
(213) 629-7600

ERIC L. TROFF
Counsel of Record
Gibbs, Giden, Locher
& TURNER LLP
2029 Century Park East
34th Floor
Los Angeles, CA 90067
(310) 734-3324

Attorneys for Respondents